

state tort liability requires the litigating attorney to prove the elements of duty, breach of duty, causation, and damages as interpreted by federal case law.

(b) The foregoing principles and requirements will be followed in regard to tort claims against the United States under other subparts, with certain exceptions noted within the individual subparts or particular tort statutes.

(c) Interpretation will be made in accordance with FTCA case law and also maritime case law where applicable. Additionally, a noncombat activity can furnish the basis for a claim under subparts C, F, and J of this part. Noncombat activities include claims arising out of civil works, such as inverse condemnation.

(d) Federal, not state or local, law applies to a determination as to who is a federal employee or a member of the armed forces. Under all subparts, the designation "federal employee" excludes a contractor of the United States. See 28 U.S.C. 2671. See however, § 536.23(b)(4)(ii) concerning personal services contractors. For employment identification purposes apply FTCA case law in making a determination.

(e) Federal, not state or local, law applies to an interpretation of the SOL under all subparts. Minority or incompetence does not toll the SOL. Case law developed under the FTCA will be used in other subparts in interpreting SOL questions.

(f) Under the FTCA state or local law is used to determine scope of employment and under other subparts for guidance.

§ 536.42 Constitutional torts.

A claim for violation of the U.S. Constitution does not constitute a state tort and is not cognizable under any subpart. A constitutional claim will be scrutinized in order to determine whether it is totally or partially payable as a state tort. For example, a Fifth Amendment taking may be payable in an altered form as a real estate claim. For further discussion see DA Pam 27-162, paragraph 2-36.

§ 536.43 Incident to service.

(a) A member of the armed forces' claim for personal injury or wrongful death arising incident to service is not payable under any subpart except to the extent permitted by the receiving State under §§ 536.114 through 536.116 (Claims arising overseas); however, a claim by a member of the United States Armed Forces for property loss or damage may be payable under AR 27-20, chapter 11 or, if not, under subparts C, E, F, or G of this part. Derivative claims and claims for indemnity are also excluded.

(b) Claims for personal injury or wrongful death by members of a foreign military force participating in a joint military exercise or operation arising incident to service are not payable under any subpart. Claims for property loss or damage, but not subrogated claims, may be payable under subpart C of this part. Derivative claims and claims for indemnity or contribution are not payable under any subpart.

NOTE TO § 536.43: For further discussion see DA Pam 27-162, paragraph 2-37.

§ 536.44 FECA and LSHWCA claims exclusions.

A federal or NAFI employee's personal injury or wrongful death claim payable under the Federal Employees Compensation Act (FECA) or the Longshore and Harbor Workers Compensation Act (LSHWCA) is not payable under any subpart. Derivative claims are also excluded but a claim for indemnity may be payable under certain circumstances. A federal or NAFI employee's claim for an incident-to-service property loss or damage may be payable under AR 27-20, chapter 11 or, if not, under subparts C, D, F, G, H or J of this part. For further discussion see DA Pam 27-162, paragraph 2-38.

§ 536.45 Statutory exceptions.

This topic is more fully discussed in DA Pam 27-162, paragraph 2-39. The exclusions listed below are found at 28 U.S.C. 2680 and apply to subparts C, D, F, and H and §§ 536.107 through 536.113 (Claims arising in the United States) of subpart G, except as noted therein, and not to subparts E, J or §§ 536.107

§ 536.46

32 CFR Ch. V (7–1–09 Edition)

through 536.113 (Claims arising overseas) of subpart G of this part. A claim is not payable if it:

(a) Is based upon an act or omission of an employee of the U.S. government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid. This exclusion does not apply to a non-combat activity claim.

(b) Is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion is abused. This exclusion does not apply to a noncombat activity claim.

(c) Arises out of the loss, mis-carriage, or negligent transmission of letters or postal matters. This exclusion is not applicable to registered or certified mail claims under subpart C of this part. See § 536.34(i).

(d) Arises in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any customs or other law enforcement officer. See 28 U.S.C. 2680(c).

(e) Is cognizable under the SIAA (46 U.S.C. app. 741–752), the PVA (46 U.S.C. app. 781–790), or the AEA (46 U.S.C. app. 740). This exclusion does not apply to subparts C, F, H or J of this part.

(f) Arises out of an act or omission of any federal employee in administering the provisions of the Trading with the Enemy Act, 50 U.S.C. app. 1–44.

(g) Is for damage caused by the imposition or establishment of a quarantine by the United States.

(h) Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, except for acts or omissions of investigation of law enforcement officers of the U.S. government with regard to assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution. This exclusion also does not apply to a health care provider as defined in 10 U.S.C. 1089 and § 536.80 of this part, under the conditions listed therein.

(i) Arises from the fiscal operations of the U.S. Department of the Treasury

or from the regulation of the monetary system.

(j) Arises out of the combatant activities of U.S. military or naval forces, or the Coast Guard during time of war.

(k) Arises in a foreign country. This exclusion does not apply to subparts C, E, F, H, J or §§ 536.114 through 536.116 (Claims arising overseas) of subpart G of this part.

(l) Arises from the activities of the Tennessee Valley Authority, 28 U.S.C. 2680(l).

(m) Arises from the activities of the Panama Canal Commission, 28 U.S.C. 2680(m).

(n) Arises from the activities of a federal land bank, a federal intermediate credit bank, or a bank for cooperatives, 28 U.S.C. 2680(n).

NOTE TO § 536.45: This topic is more fully discussed in DA Pam 27–162, paragraph 2–39.

§ 536.46 Other exclusions.

(a) *Statutory employer.* A claim is not payable under any subpart if it is for personal injury or death of any contract employee for whom benefits are provided under any workers' compensation law, if the provisions of the workers' compensation insurance are retrospective and charge an allowable expense to a cost-type contract, or if precluded by state law. See Federal Tort Claims Handbook (FTCH), section II, D7 (posted on the Web at <https://www.jagcnet.army.mil/laawsxri/cds.nsf>. Select the link "Claims" under "JAG Publications.") The statutory employer exclusion also applies to claims that may be covered by the Defense Bases Act, 42 U.S.C. 1651–1654.

(b) *Flood exclusion.* Within the United States a claim is not payable if it arises from damage caused by flood or flood waters associated with the construction or operation of a COE flood control project, 33 U.S.C. 702(c). See DA Pam 27–162, paragraph 2–40.

(c) *ARNG property.* A claim is not payable under any subpart if it is for damage to, or loss of, property of a state, commonwealth, territory, or the District of Columbia caused by ARNG personnel, engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, or 505, who are assigned to a unit maintained